No. 71-821

In the Supreme Court of the United States

OCTOBER TERM, 1971

DELTA DEVELOPMENT COMPANY, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
KENT FRIZZELL,
Assistant Attorney General,
EDMUND B. CLARK,
ROBERT S. LYNCH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-821

DELTA DEVELOPMENT COMPANY, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 102) is reported at 447 F. 2d 989. The opinion of the district court (Pet. App. 106–129) is reported at 322 F. Supp. 121.

JURISDICTION

The judgment of the court of appeals (Pet. App. 103–104) was entered on September 16, 1971, and a petition for rehearing was denied on October 8, 1971 (Pet. App. 105). The petition for a writ of certiorari was filed on December 22, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

456-468—72——1

QUESTION PRESENTED

Whether the United States validly reserved the minerals underlying certain public lands when it disposed of those lands.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Act of July 5, 1884 (23 Stat. 103, formerly 43 U.S.C. 1071 *et seq.*), the Act of July 17, 1914 (38 Stat. 509, 30 U.S.C. 121 *et seq.*), and the regulations under the 1914 Act (43 C.F.R. 102.23–102.28 (1940 ed.)) are set forth at Pet. App. 136–143 and 151–155.

STATEMENT

The government brought this quiet title suit to determine the ownership of the mineral rights in certain lands located in Plaquemines Parish, Louisiana. The district court ruled in a comprehensive opinion that the government owns the minerals by reason of a valid mineral reservation (Pet. App. 106–129). The court of appeals affirmed *per curiam* (Pet. App. 102).

The pertinent facts were stipulated by the parties as a basis for motions for summary judgment, and are set forth fully in the district court's opinion. Petitioners own the surface of the properties in question, which are salt water marsh lands situated within the Bastian Bay gas field (Pet. App. 106). This land originally comprised a federal military reservation, but was abandoned for that purpose in 1886 and placed under the control of the Secretary of the Interior for disposition pursuant to the Act of July 5, 1884 (Pet. App. 108). In 1946 John E. Pottharst,

petitioners' predecessor in title, applied for a patent to the land (Pet. App. 110). As required by applicable statutes, the government investigated whether the property was valuable for minerals; Pottharst filed a nonmineral affidavit stating that to his knowledge the land had no mineral value (*ibid.*). The government concluded otherwise following its investigation (see Pet. App. 111–113). Pottharst then consented to an amendment to his application, as required by statute, to exclude the minerals from it, and the patent issued to him reserved oil, gas, and certain other minerals to the government (Pet. App. 113–114).

Pottharst subsequently conveyed a portion of the property subject to the mineral reservation. The reservation was acknowledged again some ten years later, in 1958, in the probate proceedings concerning Mr. Pottharst's estate (Pet. App. 114–115). The government has issued a mineral lease covering the interest which it reserved; the lessees under that lease have expended substantial sums in developing the minerals in the property, and have paid substantial royalties to the government (Pet. App. 115–116).

On these facts, the district court held that the Secretary of the Interior was required by the express terms of the 1884 Act to determine the possible mineral character of the land involved here prior to any disposition (Pet. App. 122). The court concluded that the Secretary's decision that this land was valuable for oil, gas and certain other minerals was properly made and supported by the administrative record, and rejected the various arguments made by

petitioners challenging this (Pet. App. 116–121). As to the mineral reservation, the court held that the Secretary had properly reserved the minerals from the patent issued, in accordance with the 1914 Act (Pet. App. 117, 124), and ruled that the reservation, which the patentee accepted as a condition to his buying the land, could not be challenged at this late date (Pet. App. 129). Accordingly, the court ordered that title to the minerals be quieted in the government (Pet. App. 130–135). The court of appeals affirmed on the basis of "the cogent opinion of the district court" (Pet. App. 102).

ARGUMENT

For the reasons set forth at length in the district court's opinion, we believe that the decision below is correct. There is no conflict of decisions or other reason warranting further review by this Court.

1. Section 5 of the Act of July 5, 1884 (Pet. App. 140) provides that "Whenever any lands containing valuable mineral deposits shall be vacated by the reduction or abandonment of any military reservation under the provisions of this act, the same shall be disposed of exclusively under the mineral land laws of the United States." This explicit direction required the Secretary to determine whether the property involved here, which was an abandoned military reservation, contained valuable mineral deposits, and, if so, to apply the mineral land laws to its disposition.

That is precisely what was done here. Following the examination of this property, the Secretary concluded that it contained valuable mineral deposits.

It could then be disposed of only in accordance with "the mineral land laws of the United States."[1] When the disposition here occurred, the Act of July 17, 1914, required that lands classified as potentially valuable for minerals could be disposed of only if the minerals were reserved to the government. This requirement was fully applicable to the transaction involved here. See *Brennan* v. *Udall*, 379 F. 2d 803, 805 (C.A. 10), certiorari denied, 389 U.S. 975; *Anderson* v. *McKay*, 211 F. 2d 798, 803 (C.A. D.C.), certiorari denied, 348 U.S. 836; 43 C.F.R. 102.23 (1940 ed.), set forth at Pet. App. 151–152. Hence, the district court correctly concluded that the government's reservation of the mineral rights complied with applicable law, and that the government validly retained title to the minerals.

2. Additional considerations also support the decision below (see Pet. App. 125–129). The interpretation of the applicable statutes accords with the long-standing view of the agency (see, *e.g.*, *Simon*

---

[1] The laws applicable, of course, were those extant at the time of the disposition of the land. *Northern Pacific R.R. Co.* v. *Sanders*, 166 U.S. 620, 634–637; *Northern Pacific Ry. Co.* v. *Soderberg*, 188 U.S. 526, 533–534; *Nelson* v. *Northern Pacific Ry. Co.*, 188 U.S. 108, 133–134; *West Coast Exploration Co.* v. *McKay*, 213 F. 2d 582, 597 (C.A. D.C.), certiorari denied, 347 U.S. 989; *Anderson* v. *McKay*, 211 F. 2d 798, 807 (C.A. D.C.), certiorari denied, 348 U.S. 836.

Randolph, 23 L.D. 516, 518). The consistent administrative position on the issue is entitled to weight.[2] See *Udall* v. *Tallman*, 380 U.S. 1, 16. Moreover, petitioners did not challenge the government's ownership of the minerals for many years, so their claims are barred by the doctrine of acquiescence. *Brennan* v. *Udall*, *supra*, 379 F. 2d at 807–808.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
KENT FRIZZELL,
Assistant Attorney General.
EDMUND B. CLARK,
ROBERT S. LYNCH,
Attorneys.

FEBRUARY 1972.

---

[2] The government has disposed of the great bulk of the public lands covered by the 1884 Act in accordance with the view of the statutory scheme sustained by the courts below. A contrary decision necessarily would have a substantial unsettling effect on these transactions. Cf. *McLaren* v. *Fleischer*, 256 U.S. 477, 481.

U.S. GOVERNMENT PRINTING OFFICE: 1972